UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TRUSTEES OF THE TEAMSTERS LOCAL 631 SECURITY FUND FOR SOUTHERN NEVADA, Plaintiffs(s), vs. DARRELL L BEAVERS, et al., Defendant(s).	2:13-cv-00824-GMN-NJK **REPORT & RECOMMENDATION**

Before the Court is Plaintiffs' Motion for Default Judgment Against Defendants Philip Clough, Kevin S. Gavette, Christopher Schenck, and Shaun E. Upson (Docket No. 40).

I. BACKGROUND

A. Defendant Philip Clough

In 2004, Defendant Clough enrolled for health benefits in the Teamsters Local 631 Security Fund of Southern Nevada (the "Fund") health and welfare Plan (the "Plan"). When he enrolled, Defendant Clough indicated that Gia Clough and Kiera Clough were his children and therefore eligible for benefits under the terms of the Plan. Accordingly, the Fund paid $8,964 in health and welfare payments on behalf of Gia and Kiera Clough.

Plaintiffs contend that Defendant Clough later failed to respond to multiple requests from an independent firm hired by the Fund to verify the eligibility of Gia and Kiera Clough. As a result, Gia and Kiera Clough's benefits were suspended and their eligibility was terminated pursuant to the terms of the Plan. Further, under the terms of the Plan, if the Plan pays benefits on behalf of the dependent that is later found not to be eligible for benefits, the participant is required to promptly

reimburse the Plan in full. Accordingly, Plaintiffss assert that Defendant Clough must reimburse the Fund for the $8,964 in health and welfare payments made on behalf of Gia and Kiera Clough.

B. Defendant Kevin S. Gavette

In 2007, Defendant Gavette enrolled in the Plan. When he enrolled, Defendant Gavette indicated that Stephanie Gavette was his spouse and therefore eligible for benefits under the terms of the Plan. Accordingly, the Fund paid $6,734 in health and welfare payments on behalf of Stephanie Gavette.

Plaintiff contend that Defendant Gavette later failed to respond to multiple requests from an independent firm hired by the Fund to verify the eligibility of Stephanie Gavette. As a result, Stephanie Gavette's benefits were suspended and her eligibility was terminated pursuant to the terms of the Plan. Further, under the terms of the Plan, if the Plan pays benefits on behalf of the dependent that is later found not to be eligible for benefits, the participant is required to promptly reimburse the Plan in full. Accordingly, Plaintiffss assert that Defendant Gavette must reimburse the Fund for the $6,734 in health and welfare payments made on behalf of Stephanie Gavette.

C. Defendant Christopher Schenck

Also in 2007, Defendant Schenck enrolled in the Plan. When he enrolled, Defendant Schenck indicated that Stacy F. Schenck was his spouse and that Cody M. Schenck was his child and therefore they were eligible for benefits under the terms of the Plan. Accordingly, the Fund paid $6,153 in health and welfare payments on behalf of Stacy and Cody Schenck.

Plaintiff contends that Defendant Schenck later failed to respond to multiple requests from an independent firm hired by the Fund to verify the eligibility of Stacy and Cody Schenck. As a result, Stacy and Cody Schenck's benefits were suspended and their eligibility was terminated pursuant to the terms of the Plan. Further, under the terms of the Plan, if the Plan pays benefits on behalf of the dependent that is later found not to be eligible for benefits, the participant is required to promptly reimburse the Plan in full. Accordingly, Plaintiffss assert that Defendant Schenck must reimburse the Fund for the $6,153 in health and welfare payments made on behalf of Stacy and Cody Schenck.

. . .

D. Defendant Shaun E. Upson

In 2006, Defendant Upson enrolled in the Plan. When he enrolled, Defendant Upson indicated that Jonell M. Upson was his spouse and that Crystal D. Deloera, Aziryah U. Upson, and Shaun E. Upson were his children and therefore they were eligible for benefits under the terms of the Plan. Accordingly, the Fund paid $15,652 in health and welfare payments on behalf of Jonell, Crystal, Aziryah, and Shaun.

Plaintiff contends that Defendant Upson later failed to respond to multiple requests from an independent firm hired by the Fund to verify the eligibility of Jonell, Crystal, Aziryah, and Shaun. As a result, Jonell, Crystal, Aziryah, and Shaun's benefits were suspended and their eligibility was terminated pursuant to the terms of the Plan. Further, under the terms of the Plan, if the Plan pays benefits on behalf of the dependent that is later found not to be eligible for benefits, the participant is required to promptly reimburse the Plan in full. Accordingly, Plaintiffss assert that Defendant Upson must reimburse the Fund for the $15,652 in health and welfare payments made on behalf of Jonell, Crystal, Aziryah, and Shaun.

E. Motion for Default Judgment

On May 10, 2013, Plaintiffs filed a complaint against Defendants Clough, Gavette, Schenck, and Upson (collectively "Defendants"). Docket No. 1. Thereafter, Plaintiffs made numerous attempts to serve and locate Defendants, but were unsuccessful. *See* Docket Nos. 27 and 28. Accordingly, on September 9, 2013, Plaintiffs moved for service by publication. Docket No. 28. The Court found that Plaintiffs had made a good faith effort to locate and serve Defendants and, accordingly, allowed Plaintiffs to serve Defendants by publication. Docket No. 29. Plaintiffs then served Defendants by publication in the Nevada Legal News, a daily newspaper of general circulation, and, on October 15, 2013, it returned each summons as executed to the Court. Docket No. 34. Defendants were given until November 4, 2013, to answer the complaint. *Id*. To date, Defendants not appeared in this action.

On November 5, 2013, Plaintiffs moved for entry of clerks default as to Defendants. Docket No. 36. The Clerk entered default against Defendants the following day. Docket No. 37. Subsequently, on January 10, 2014, Plaintiffs filed the present motion seeking default judgment

against Defendants. Docket No. 40.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 55(a), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed.R.Civ.P. 55(a). Federal Rule of Civil Procedure 55(b)(2) provides that "a court may enter a default judgment after the party seeking default applies to the clerk of the Court as required by subsection (a) of this rule." Fed.R.Civ.P. 55(b)(2).

On November 6, 2013, the Clerk entered default against Defendants for their failure to plead or otherwise defend the instant lawsuit. Docket No. 37. Pursuant to Federal Rule of Civil Procedure 55(b)(2), Plaintiffss now ask this Court to enter default judgment against Defendants.

The choice as to whether a default judgment should be entered is at the sole discretion of the trial court. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). A defendant's default alone does not entitle a Plaintiffs to a court-ordered judgment. *See id.* Instead, the Ninth Circuit has determined that a court should look at seven discretionary factors before rendering a decision on default judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). These factors are: (1) the possibility of prejudice to the Plaintiffs; (2) the merits of Plaintiffs' substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Id.* In applying these *Eitel* factors, "the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977); *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). *see also* Fed.R.Civ.P. 9(b).

Plaintiffs are required to prove all damages sought in the complaint, and those damages may not "differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed.R.Civ.P. 54(c). If sufficiently documented and detailed, damages claims may be fixed by an accounting, declarations, or affidavits. *See James v. Frame*, 6 F.3d 307, 310 (5th Cir.1993).

III. DISCUSSION

A. Default Judgment

The first *Eitel* factor favors default judgment. Plaintiffs may be prejudiced if the terms of the Plan were not enforced because Defendants obtained the benefits on behalf of the persons they listed as their spouses and children by potentially misrepresenting their dependents' status by failing to verify their eligibility. Further, Plaintiffs have no other recourse to recoup damages caused by Defendants and prevent Defendants from further infringement. *See Adobe Sys. Inc. v. Marmeletos*, 2009 WL 1034143 at *3 (N.D.Cal. Apr. 16, 2009). Defendants have not answered or otherwise responded to the complaint. If Plaintiffs' motion for default judgment is not granted, Plaintiffs "will likely be without other recourse for recovery." *PepsiCo, Inc. v. Cal. Security Cans*, 283 F.Supp.2d 1127, 1177 (C.D.Cal. 2002).

The second and third *Eitel* factors favor a default judgment where the claims are meritorious and the complaint sufficiently states a claim for relief. *See Cal. Security Cans*, 238 F.Supp.2d at 1175; *Danning v. Lavine*, 572 F.2d 1386, 1388–89 (9th Cir. 1978)). Plaintiffs' complaint states a plausible claim for relief. *See* Docket No. 1, at 10-11. Further, Plaintiffs' complaint is well pleaded as it identifies Defendants, enumerates Plaintiffs' rights, describes the payments that were mistakenly made due to Defendants' potential misrepresentations and failure to verify eligibility in accordance with the terms of the Plan, and sets forth a proper cause of action for Defendants' conduct. *Id*.

Under the fourth *Eitel* factor, the Court considers the amount of money at stake in relation to the seriousness of Defendants' conduct. *See Cal. Security Cans*, 238 F.Supp.2d at 1176. The sum in controversy is $8,964 for Defendant Clough, $6,734 for Defendant Gavette, $6,153 for Defendant Schenck, and $15,652 for Defendant Upson, based on each Defendants' potential misrepresentations and failure to follow the terms of the Plan. Thus, this factor favors default judgment.

The *fifth* Eitel factor also favors default judgment. Given the sufficiency of the complaint, the terms of the Plan and Defendants' failure to verify the eligibility of their listed spouses and children, "no genuine dispute of material facts would preclude granting [Plaintiffs'] motion." *Cal. Security Cans*, 238 F.Supp.2d at 1177. Defendants did not answer the complaint, thus "the factual allegations of the complaint ... will be taken as true." *Geddes*, 559 F.2d at 560.

Applying the sixth factor, the court cannot conclude that Defendants' defaults are due to excusable neglect. Defendants were properly served with a summons and the complaint. Docket No. 17. Defendants' failure to respond or litigate this case cannot be attributable to excusable neglect. *United States v. High Country Broadcasting Co., Inc*., 3 F.3d 1244, 1245 (9th Cir. 1993) (holding that it was "perfectly appropriate" for the district court to enter default judgment against a corporation that failed to appear in the action through licensed counsel).

The final *Eitel* factor weighs against default judgment. "Cases should be decided upon their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. But the mere existence of Rule 55(b) "indicates that this preference, standing alone, is not dispositive." *Cal. Security Cans*, 238 F.Supp. at 1177 (citation omitted). Moreover, Defendants' failure to answer or otherwise respond to the complaint "makes a decision on the merits impractical, if not impossible." *Id*.

Having reviewed Plaintiffs' motion and the evidence previously submitted in this case, and having considered the *Eitel* factors as a whole, the Court concludes that the entry of default judgment is appropriate against Defendants. The Court now turns to the reasonableness of the damages and relief sought in the default judgment.

B. Damages

Once liability is established in a default situation, a Plaintiffs must then establish that the requested relief is appropriate. *Geddes*, 559 F.2d at 560. ERISA explicitly provides for the recovery of unpaid contributions, interest on the unpaid contributions, liquidated damages, attorneys' fees and costs, and other relief deemed appropriate. 29 U.S.C. § 1132(g)(2). Plaintiffs have adequately pled and shown $8,964 for Defendant Clough, $6,734 for Defendant Gavette, $6,153 for Defendant Schenck, and $15,652 for Defendant Upson in erroneously paid benefits, as well as $7,575 ($1,982 for Defendant Clough, $1,967 for Defendant Gavette, $1,959 for Defendant Schenck, and $2,061 for Defendant Upson) in attorneys' fees and costs as discussed below. Thus, the total amount of damages is $45,078.

C. Past Attorneys' Fees and Costs

In this Circuit, the starting point for determining reasonable fees is the calculation of the "lodestar," which is obtained by multiplying the number of hours reasonably expended on litigation

by a reasonable hourly rate. *See Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). In calculating the lodestar, the Court must determine a reasonable rate and a reasonable number of hours for each attorney. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986), reh'g denied, amended on other grounds, 808 F.2d 1373 (9th Cir.1987).

Here, Plaintiffs have requested that the Court find $7,575 in attorneys' fees for 11.6 hours of work at a rate of $160 - $165 per paralegal hour, $270 - $250 per associate hour, and $300 per shareholder hour to be reasonable. *See* Affidavit of Bryce C. Loveland, Docket No. 40-1, at 2 *see also* Invoice, Docket No. 40-1, at 10-31. Plaintiffs have assigned a *pro rata* share of the general litigation costs to each Defendant, and have assigned each Defendant the complete attorneys' fees for the work performed specific to them. Thus, Plaintiffs seek a total of $7,575 ($1,982 for Defendant Clough, $1,967 for Defendant Gavette, $1,959 for Defendant Schenck, and $2,061 for Defendant Upson) in past attorneys' fees and costs from Defendants. The Court finds the rate, the time spent, and the *pro rata* determination to be reasonable and recommends that Plaintiffs' past attorneys' fees be awarded in full.

D. Anticipated Attorneys' Fees and Costs

Plaintiffs state that they "anticipate[] to incur an additional $2,500 in attorney's fees [per Defendant] in executing on the Judgment." Docket No. 40, at 10. Accordingly, Plaintiffs request that the Court enter judgment for the additional $2,500 per Defendant in anticipated costs and fees. *Id*. To support its' request, Plaintiffs cite to 29 U.S.C. § 1132(g)(1) for the proposition that the Court is permitted to allow reasonable attorney's fees in an action brought under § 1132(a)(3).

29 U.S.C. § 1132(g)(1) states as follows:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

There is no mention of anticipated costs and fees in the statute. Further, Plaintiffs provide no other authority or explanation for why the Court should grant the arbitrary amount of $2,500 per Defendant for anticipated costs and fees as part of judgment. Accordingly, this request should be denied.

. . .

IV. CONCLUSION

Based on the foregoing, and good cause appearing therefore,

IT IS THE RECOMMENDATION of the undersigned United States Magistrate Judge that Plaintiffs' Motion for Default Judgment Against Defendants Philip Clough, Kevin S. Gavette, Christopher Schenck, and Shaun E. Upson (Docket No. 40) be GRANTED in part in accordance with this Report and Recommendation.

IT IS THE FURTHER RECOMMENDATION of the undersigned United States Magistrate Judge that this Court award Plaintiffs a total of $8,964 in damages and $1,982 in attorneys' fees and costs against Defendant Clough.

IT IS THE FURTHER RECOMMENDATION of the undersigned United States Magistrate Judge that this Court award Plaintiffs a total of $6,734 in damages and $1,967 in attorneys' fees and costs against Defendant Gavette.

IT IS THE FURTHER RECOMMENDATION of the undersigned United States Magistrate Judge that this Court award Plaintiffs a total of $6,153 in damages and $1,959 in attorneys' fees and costs against Defendant Schenck.

IT IS THE FURTHER RECOMMENDATION of the undersigned United States Magistrate Judge that this Court award Plaintiffs a total of $15,652 in damages and $2,061 in attorneys' fees and costs against Defendant Upson.

DATED this 6th day of February, 2014.

NANCY J. KOPPE
United States Magistrate Judge

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within 14 days of service of this document.** The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).